

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20<sup>th</sup> day of May, two thousand sixteen.

PRESENT: DENNIS JACOBS,  
BARRINGTON D. PARKER,  
REENA RAGGI,  
Circuit Judges.

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SALOMON QUERUB, HOTEL VENTURES, HOWARD  
PRITCHARD, HARRIET GOLDSTEIN,  
individually and on behalf of all  
others similarly situated, THOMAS  
ROSENBERGER, STEVEN WEISSMANN, TRELLUS  
MGMT. CO. LLC,  
Plaintiffs-Appellants,

-v.-

15-2100

MOORE STEPHENS HONG KONG,  
Defendant-Appellee.

PUDA COAL, INC., MING ZHAO, LIPING ZHU,  
QIONG LABY WU, YAO ZHAO, CARRET & CO.,  
LLC, MACQUARIE CAPITAL (USA) INC.,

1 JIANFEI NI, C. MARK TANG, LAWRENCE  
2 WIZEL, BREAN MURRAY, CARRT & CO., LLC,  
3 MOORE STEPHENS INT'L LTD., MOORE  
4 STEPHENS, P.C.,  
5 Defendants.  
6

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9 **FOR APPELLANTS:** LAURENCE M. ROSEN, The Rosen Law  
10 Firm, P.A., New York, NY; Glancy  
11 Prongay & Murray LLP, Los Angeles,  
12 CA; Pomerantz LLP, Chicago, IL;  
13 Kirby McInerney LLP, New York, NY.  
14

15 **FOR APPELLEE:** BRIAN J. MASSENGILL (James C.  
16 Schroeder, Dana Douglas, Justin A.  
17 McCarty, on the brief), Mayer  
18 Brown LLP, Chicago, IL.  
19

20 Appeal from a judgment of the United States District Court  
21 for the Southern District of New York (Forrest, J.).  
22

23 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND**  
24 **DECREED** that the judgment of the district court be **AFFIRMED**.  
25

26 Plaintiffs-appellants, investors in Puda Coal, Inc.  
27 ("Puda"), appeal from the judgment of the United States District  
28 Court for the Southern District of New York (Forrest, J.)  
29 dismissing on summary judgment their securities class action  
30 against defendant-appellee Moore Stephens Hong Kong ("Moore  
31 Stephens"). We assume the parties' familiarity with the  
32 underlying facts, the procedural history, and the issues  
33 presented for review.

34 Until April 2011, Puda was a publicly-traded, U.S.-listed  
35 company headquartered in China, which purportedly held, as its  
36 sole asset, a 90% ownership stake in Shanxi Puda Coal Group Co.,  
37 Ltd. ("Shanxi Coal"), a coal supplier for steel manufacturing.  
38 In fact, in September 2009, Puda's chairman transferred Puda's  
39 entire interest in Shanxi Coal to himself, leaving Puda a shell  
40 company. This transfer was reflected in shareholder meeting  
41 minutes for Shanxi Coal and in various documents filed in

1 China's State Administration of Industry and Commerce. But  
2 Puda's financial statements for 2009 and 2010 included all of  
3 the assets, liabilities, revenues, expenses, and net income for  
4 Shanxi Coal.

5 Moore Stephens is a Hong Kong-based audit firm that issued  
6 "clean opinions" for Puda's 2009 and 2010 financial statements  
7 pursuant to Public Company Accounting Oversight Board ("PCAOB")  
8 standards. After April 2011, when the Shanxi Coal transfer  
9 became public, Moore Stephens resigned as Puda's auditor and  
10 announced that its 2009 and 2010 audit opinions could no longer  
11 be relied upon.

12 Puda's investors filed a securities class action shortly  
13 after news broke of the Shanxi Coal transfer, alleging that  
14 Moore Stephens (and others) violated Section 11 of the  
15 Securities Act of 1933 and Section 10(b) of the Securities  
16 Exchange Act of 1934 (and Rule 10b-5). In support, plaintiffs-  
17 appellants proffered Anita C.M. Hou as an expert who testified  
18 that Moore Stephens failed to comply with the auditing standards  
19 of Hong Kong and/or the People's Republic of China. However,  
20 she admitted that she was not an expert on PCAOB and could not  
21 opine on whether the audits complied with PCAOB standards.  
22 Moore Stephens proffered Alexander H. Mackintosh as an expert  
23 in PCAOB standards who opined that Moore Stephens's 2009 and  
24 2010 audits fully complied with PCAOB standards.

25 At summary judgment, the district court struck  
26 plaintiffs-appellants' sole accounting expert, Hou, and  
27 granted summary judgment in favor of Moore Stephens. The  
28 district court reasoned that Hou did not have the requisite  
29 expertise to offer opinions on any matters relevant to the case  
30 because she had no experience or expertise in PCAOB audits and  
31 because PCAOB provides the standard of conduct that Moore  
32 Stephens allegedly failed to satisfy. Without competent  
33 evidence on PCAOB auditing standards, plaintiffs-appellants  
34 could not raise a triable issue of fact regarding whether Moore  
35 Stephens egregiously departed from applicable professional  
36 standards of care. The district court further concluded that  
37 plaintiffs-appellants failed to proffer any evidence that Moore  
38 Stephens issued subjectively false opinions. This appeal  
39 followed.

1 We review for abuse of discretion the admission or  
2 exclusion of expert testimony. Major League Baseball Props.,  
3 Inc. v. Salvino, Inc., 542 F.3d 290, 311 (2d Cir. 2008). We  
4 review de novo a district court's grant of summary judgment.  
5 Noll v. Int'l Bus. Machs. Corp., 787 F.3d 89, 93 (2d Cir. 2015).

6 1. An expert witness is "permitted wide latitude to offer  
7 opinions, including those that are not based on firsthand  
8 knowledge or observation," but only after a trial judge has  
9 determined "whether the expert is proposing to testify to (1)  
10 scientific knowledge that (2) will assist the trier of fact to  
11 understand or determine a fact in issue"; "[e]xpert testimony  
12 which does not relate to any issue in the case is not relevant  
13 and, ergo, non-helpful." Daubert v. Merrell Dow Pharm., Inc.,  
14 509 U.S. 579, 591-92 (1993). In other words, the expert must  
15 be qualified to testify as to a certain issue; the expert must  
16 offer an opinion on that issue that is informed by reliable  
17 information and methodology; and the probative value of the  
18 expert testimony must not be substantially outweighed by the  
19 danger of, inter alia, confusion of the issues or misleading  
20 the jury. Nimely v. City of New York, 414 F.3d 381, 397 (2d  
21 Cir. 2005).

22 The district court appropriately struck Hou as an expert  
23 witness. As she admitted, Hou lacks experience and expertise  
24 in conducting or reviewing audits done according to PCAOB  
25 standards and is therefore not qualified to opine on PCAOB  
26 auditing standards. Because Puda was a U.S.-listed company,  
27 the only auditing standards in question are those promulgated  
28 by PCAOB – not those of Hong Kong or PRC – so Hou is not qualified  
29 as an expert on the sole relevant auditing standard. Opinions  
30 on Hong Kong and/or PRC auditing standards would not be helpful  
31 to the jury on any relevant issue, and would risk muddling the  
32 issue of the applicable standard of care. Finally, Hou's  
33 testimony that auditing standards in Hong Kong or PRC do not  
34 materially differ from PCAOB standards is speculative.  
35 Because she is not qualified to opine on PCAOB standards, she  
36 has no basis for comparing them with other standards.

37 2. A violation of Section 10(b) requires "scienter, a  
38 mental state embracing intent to deceive, manipulate, or  
39 defraud." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551

1 U.S. 308, 319 (2007) (internal quotation marks omitted).  
2 Recklessness satisfies the scienter requirement when the  
3 conduct is "highly unreasonable, representing an extreme  
4 departure from the standards of ordinary care." Rothman v.  
5 Gregor, 220 F.3d 81, 98 (2d Cir. 2000) (internal quotation marks  
6 omitted). For an auditor, the conduct "must, in fact,  
7 approximate an actual intent to aid in the fraud being  
8 perpetrated by the audited company." Id. In essence,  
9 recklessness requires a showing that the "audit [was] so  
10 deficient as to amount to no audit at all." In re Advanced  
11 Battery Techs., Inc., 781 F.3d 638, 644 (2d Cir. 2015).

12 Plaintiffs-appellants cannot raise a triable issue of fact  
13 as to whether Moore Stephens was sufficiently reckless to be  
14 liable under Section 10(b). They fall short regardless of  
15 whether they are required to proffer expert testimony to  
16 establish scienter for this claim. If expert testimony is  
17 necessary, plaintiffs-appellants have no factual basis for  
18 alleging that the 2009 and 2010 audits were "extreme  
19 departure[s]" from PCAOB standards "amounting to no audit at  
20 all" because they cannot establish the PCAOB standard of  
21 ordinary care. The uncontested expert testimony is that Moore  
22 Stephens fully complied with PCAOB standards. If expert  
23 testimony is not required, plaintiffs-appellants still fail to  
24 show Moore Stephens conducted the audits recklessly. The  
25 purported "red flags" were not obvious signs of fraud; at its  
26 core the complaint alleges "fraud by hindsight," which is  
27 inadequate. See Advanced Battery, 781 F.3d at 645-46; see also  
28 Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu  
29 CPA, Ltd., 2016 WL 1392280, at \*2 (2d Cir. Apr. 8, 2016).

30 **3.** Statements of opinion are actionable under Section 11  
31 as false or misleading only if (i) "the issuer of the opinion  
32 held a subjective belief inconsistent with the opinion," or (ii)  
33 the "opinion 'omits material facts about the issuer's inquiry  
34 into or knowledge concerning a statement of opinion, . . . if  
35 those facts conflict with what a reasonable investor would take  
36 from the statements [of opinion] itself." Special Situations  
37 Fund, 2016 WL 1392280, at \*3 (quoting Omnicare, Inc. v. Laborers  
38 Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1329  
39 (2015)). Audit reports, labeled "opinions" and involving  
40 considerable subjective judgment, are statements of opinion

1 subject to the Omnicare standard for Section 11 claims. Id.

2       There is no evidence that Moore Stephens did not believe  
3 its "clean audit opinions" for Puda's 2009 or 2010 financial  
4 statements. Nor is there evidence that Moore Stephens omitted  
5 material facts about the basis for its audit reports.  
6 Plaintiffs-appellants cannot sustain their Section 11 claim.

7       Accordingly, and finding no merit in plaintiff-appellants'  
8 other arguments, we hereby **AFFIRM** the judgment of the district  
9 court.

10                                   FOR THE COURT:

11                                   CATHERINE O'HAGAN WOLFE, CLERK